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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

MANUEL ANTONIO VALLES-ZAMORA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. A jury convicted Petitioner of conspiring to transport undocumented aliens for private financial gain in violation of 8 U.S.C. § 1324. Under Fifth Circuit law, such a conviction required the government to prove, beyond a reasonable doubt, that Petitioner "conspired to move within the United States an alien present in the United States in violation of law." *United States v. Crispin*, 757 F.2d 611, 612 (5th Cir. 1985). However, the government proffered no evidence substantiating its claim that the aliens transported were present illegally. Petitioner asks this Court to decide whether the government must prove, as an element of the charge to conspire to transport undocumented aliens as found in 8 U.S.C. § 1324, that the aliens transported in furtherance of the conspiracy were present in the United States illegally.

II. The Government had constructive possession of exculpatory, material evidence relevant to Petitioner's defense at least six months prior to the trial's beginning, yet failed to answer Petitioner's numerous discovery requests until one day prior to trial. Moreover, the evidence in question – photographs – was not turned over in its original, color form. Rather, Petitioner received only faxed, black-and-white photocopies. Petitioner asks this Court to determine whether such egregious violations of Federal Rule of Criminal Procedure 16 result in a violation of Petitioner's Due Process rights under the Fifth

QUESTIONS PRESENTED – Continued

Amendment and his rights under the Confrontation Clause such that his rights to a fair trial were irreparably harmed.

III. In 2000, this Court ruled that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (U.S. 2000). The District Court ordered two enhancements to Petitioner's sentence: one for transporting at least six aliens, pursuant to U.S.S.G. § 2L1.1(b)(2)(A), and another for creating an environment of "substantial risk of death or serious bodily injury to another person," pursuant to U.S.S.G. § 2L1.1(b)(6). The application of these two enhancements increased Petitioner's sentencing range from 10-16 months (Offense Level 12) to 27-33 months (Offense Level 18). However, the facts on which the court based the enhancements were neither submitted to the jury nor proven beyond a reasonable doubt. Petitioner asks this Court to determine whether the District Court has the authority to increase one's sentence based on unproven facts in a jury trial and whether such actions constitute a breach of Petitioner's Fifth Amendment Due Process rights and Sixth Amendment guarantees.

PARTIES TO THE PROCEEDING

The Petitioner here is Manuel Antonio Valles-Zamora.

The Respondent here is the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Manuel Antonio Valles-Zamora, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 2007 WL 3230322 (slip copy) (CA5 2007).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 31, 2007. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Fed. R. Crim. Proc. 16

8 U.S.C. § 1324

U.S.S.G. § 2L1.1

STATEMENT OF THE CASE

On January 7, 2005, Mr. Tyler Severn, driving a truck with an attached livestock trailer, approached a border patrol station just south of Hebbronville, Texas. Upon inspection, Mr. Severn's trailer was found to be hiding a woman and her four alleged children. Mr. Severn was arrested for trafficking undocumented aliens.

During questioning, Mr. Severn stated that he intended to deliver the passengers to Petitioner, Mr. Valles, and that Mr. Valles could be found a few miles up the road in Hebbronville. An agent drove to Hebbronville, located Mr. Valles at a grocery store, and brought him back to the border patrol station, whereupon Mr. Severn identified Mr. Valles as the man to whom he would make delivery. That day, Mr. Valles was arrested.

On January 10, 2005, the government filed a criminal complaint against Petitioner for violation of 8 U.S.C. § 1324(a)(1)(A)(ii). An indictment was returned on February 1, 2005 which was superseded first on March 15, 2005, and superseded again on May 10, 2005. The three indictments charged Mr. Valles with conspiracy to violate 8 U.S.C. § 1324.

During Petitioner's criminal trial in the United States District Court for the Southern District of Texas, the government produced no evidence, apart from inadmissible hearsay statements, showing the aliens whom Petitioner allegedly conspired to transport were, in fact, present in the United States illegally.

Although one element of the government's case thereby remained unproven, the court denied Petitioner's motion to dismiss the indictment. Further, the District Court allowed the government to present photographic evidence which was erroneously and intentionally withheld from Petitioner until the day prior to the trial, and for which proper foundation and authentication were never shown. On June 2, 2005, a jury found Mr. Valles guilty of the single count conspiracy to transport undocumented aliens in violation of 8 U.S.C. § 1324. After trial, Mr. Valles filed a timely Motion for Judgment of Acquittal, which was subsequently denied.

Petitioner was eventually sentenced to a 30-month prison term along with a $100 fine. The presentence report set Petitioner's sentencing range at 27 to 33 months, based on an offense level of 18 and a Category I criminal history. The offense level resulted from a base offense level of 12, U.S.S.G. § 2L1.1(a)(2), plus three levels of enhancement for involving at least six aliens, U.S.S.G. § 2L1.1(b)(2), with an additional three levels for creating a substantial risk of death or serious bodily injury to another person, U.S.S.G. § 2L1.1(b)(5).

On October 6, 2005, Mr. Valles timely filed a Notice of Appeal. In his appellate briefs, Petitioner argued, inter alia, that his conviction lacked sufficient evidence to withstand scrutiny, the government intentionally failed to comply with federal discovery rules, the prosecution's evidence was improperly admitted, and that Petitioner's sentence was improperly

enhanced based on unproven facts never submitted to the jury, in violation of his Sixth Amendment rights.

The United States Court of Appeals for the Fifth Circuit affirmed Petitioner's conviction in its order dated October 31, 2007, wherein it stated that Petitioner's arguments offered no basis for relief. The Fifth Circuit held that proving the crime of conspiracy to violate 8 U.S.C. § 1324 does not require the government to prove beyond a reasonable doubt that the aliens transported were undocumented. Further, the court argued that the government's actions violated no applicable discovery rules and its evidence was properly admitted. Finally, the court argued that this Court's ruling in *Apprendi v. New Jersey* was unavailing because the lower court imposed a sentence lower than the statutorily prescribed maximum.

Petitioner hereby appeals the appellate court's ruling and requests this Court issue a writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. Because the Government Failed to Prove One Element of the Conspiracy Charge, Namely, That Petitioner Knew of or Recklessly Disregarded the Aliens' Unlawful Presence in the United States, the Jury's Conviction Cannot Be Sustained as a Matter of Law; A Writ of Certiorari Should Therefore Issue to Set Right the Violence Done to Petitioner's Fifth Amendment Due Process and Sixth Amendment Rights.

Petitioner was convicted of conspiracy to violate 8 U.S.C. § 1324, the unlawful transportation of undocumented aliens. A basic maxim of criminal law is that the government must prove, beyond a reasonable doubt, each element of the crime in order to sustain a conviction. *See United States v. Cuellar*, 441 F.3d 329 (5th Cir. 2005). In this case, the government failed to prove the aliens transported were, in fact, undocumented and present illegally in the United States. Moreover, the government offered no proof that Petitioner was aware of, or recklessly disregarded, the aliens' legal status. Failure to offer any such evidence constitutes sufficient grounds for reversal and remand.

Any justified conviction must rest on the jury's finding, beyond a reasonable doubt, that Petitioner "conspired to move within the United States an alien *present in the United States in violation of law*," *United States v. Crispin*, 757 F.2d 611, 612 (5th Cir. 1985) (emphasis added), i.e., that Petitioner conspired

to move an *illegal alien* and not something else. The government's failure to prove the alienage of the persons transported stands in direct contravention to principles established by the United States Court of Appeals for the Fifth Circuit. In *United States v. Diaz*, 936 F.2d 786 (5th Cir. 1991), the Fifth Circuit held that a conviction for conspiring to violate 8 U.S.C. § 1324(a) could not be sustained when the government failed to prove beyond a reasonable doubt both "the status and Diaz's knowledge of the status of the aliens named in the indictment." *Id.* at 788.

Moreover, no difference exists between the mental states required for a substantive § 1324 conviction and a conviction to conspire to violate § 1324. *United States v. Hernandez-Acuna*, 2006 U.S. App. LEXIS 25788, *7 n.1 (5th Cir. Oct. 17, 2006) ("[T]he mental state in the jury instruction for conspiracy is the same as the mental state for the transportation of illegal aliens."). In the instant case, the government was required to prove that Petitioner conspired to violate § 1324 "knowing or in reckless disregard of the fact that the illegal alien [was] here illegally, and in furtherance of the illegal alien's violation of the law." *Id.*

During Petitioner's trial, the government proffered no evidence, save inadmissible hearsay statements, tending to prove either that the transported aliens were indeed undocumented or that Petitioner knew of, or recklessly disregarded, the aliens' undocumented status. Even if one assumes the evidence was properly admitted, the government still lacked

evidence sufficient to prove each element of the conspiracy charge as it pertains to Petitioner.

First, the admitted hearsay statement only tends to show *Mr. Severn*, not *Petitioner*, may have known of or recklessly disregarded the aliens' unlawful presence in the United States. Petitioner never met the participants involved in the allegedly criminal transportation; no statement offered by Mr. Severn, the alien, or any other person involved can credibly show that Petitioner had personal knowledge of the aliens' origins and legal status in the United States.

Second, the admitted hearsay statement indicated that the alien claimed she did not have the proper documents on her person to show lawful presence in the United States. However, the District and Circuit Courts failed to recognize that a negative statement is not positive evidence that she did not, in fact, have such documents. The absence of evidence is not evidence of absence. To assume otherwise twists the facts and the law in such a way as to wholly disregard Petitioner's Fifth and Sixth Amendment rights.

Incredibly, the government attempted to shift to Petitioner the burden of proof concerning this matter, arguing that Petitioner has an obligation to show prejudice stemming from the government's failure to produce witnesses or other evidence. *Reply Brief for the United States*, No. 05-41135, at 39. Failure to do so, argued the government, would negate any claims that one's Sixth Amendment jury-trial rights had

been infringed upon. *Id.* The government effectively asked Petitioner to show prejudice stemming from the prosecution's failure to prove each and every element of the case. That prejudice undoubtedly results is a logical tautology. This line of reasoning turns the Sixth Amendment on its head and purports to relieve the government of its burden to prove beyond a reasonable doubt every element of the case.

Apart from Fifth Circuit legal authority supporting Petitioner's arguments, public policy and common sense also dictate that knowledge of the aliens' legal status, or a reckless disregard thereof, must be an element of the conspiratorial crime at hand. Suppose, for argumentation purposes only, that a conspiracy to transport undocumented aliens did exist between Petitioner and Mr. Severn. Petitioner should then only be personally liable for those acts which were, in fact, executed for the purpose of carrying out the conspiracy and for which Petitioner had knowledge concerning the alienage of the persons to be transported.

For example, had Mr. Severn offered his neighbor, who, unbeknownst to Mr. Severn, was present illegally in the United States, a ride to the grocery store, such an action would qualify as an element of the conspiracy under the government's theory. That is, had Mr. Severn been detained en route to the grocery store, and had the alienage of the passenger been discovered, Petitioner would thereby face a potential ten-year prison term despite Petitioner's abject lack of knowledge regarding the passenger's alienage. Not *every* act

undertaken by one member of the conspiracy can rightly be imputed to the other members. Knowledge, or a reckless disregard, of an alien's legality must therefore be an element of the § 1324 conspiracy crime as it relates to each individual act undertaken to realize the conspiracy's overarching goals.

The effects of the government's theory, accepted by the District and Circuit Courts, are impermissibly far-reaching, having a substantial and deleterious effect on Petitioner's Due Process rights. If the government can attach any conspirator's acts to Petitioner, regardless of whether Petitioner had knowledge of an alien's legality, not only is criminal liability invoked, but Petitioner's sentence can be materially enhanced when the number of aliens transported crosses certain thresholds. *See* U.S.S.G. § 2L1.1(b)(2). That is, substantial prison time can result from actions wholly divorced from those intended and sanctioned by Petitioner. Such broad, overreaching power should not be granted to the executive branch without the substantive and procedural burdens of first proving beyond a reasonable doubt, to a jury, that the accused knew the aliens transported were, in fact, illegal.

Thus, Fifth Circuit precedent and public policy both weigh in favor of granting Petitioner's request for a writ of certiorari. With one crucial element of the crime unproven, the jury's finding of guilt cannot be sustained as a matter of law. Not only were Petitioner's Rule 29 Motion and his Motion for Judgment of Acquittal erroneously denied, but the Fifth Circuit

failed to set right the injury inflicted on Petitioner's constitutional rights, thus resulting in an obvious miscarriage of justice that Petitioner pleads this Court to rectify.

II. Because the District Court Improperly Admitted Photographic Evidence, Despite the Government's Failure to Adhere to Federal Discovery Rules in Criminal Proceedings, and Despite the Court's Failure to Authenticate the Evidence, and Because Such Impermissible Evidence Comprised the Majority of the Government's Evidence, Petitioner's Conviction Violated His Due Process Rights Under the Fifth Amendment and His Rights Under the Confrontation Clause; A Writ of Certiorari Should Therefore Issue.

Petitioner's Due Process rights were aggrieved by the District Court's failure to authenticate photographic evidence offered by the government. Prior to admission, District Courts must authenticate all relevant evidence, i.e., they must "determine if there is a reasonable probability that the evidence is what it is purported to be." *United States v. Perez-Gonzalez*, 445 F.3d 39, 47 (1st Cir. 2006) (internal citations omitted). However, in Petitioner's case, no hearing was conducted to determine authenticity; the evidence was presented to the jury without first passing through the judicial sieve created by Federal Rule of Evidence 901(a).

Petitioner's Due Process rights were further violated when the District Court admitted the government's photographic evidence despite an obvious breach of the rules governing discovery. The discovery rules embodied in Federal Rule of Criminal Procedure 16 mandate the relinquishment, upon request, of any evidence in the government's possession that is relevant. Any prejudicial failure to disclose material evidence in a timely manner constitutes a breach of Rule 16(a). *See United States v. De Weese*, 632 F.2d 1267, 1272 (5th Cir. 1980). In the instant case, the government intentionally committed an egregious breach of Rule 16(a) that infringed upon Petitioner's Due Process rights.

Petitioner originally challenged the admission of the government's photographic evidence at a pre-trial conference. Central to Petitioner's argument was the fact that his attorney did not effectively receive the photographs until one day prior to trial. Moreover, Petitioner's attorney was not allowed to see the actual color photographs. Rather, he was only given possession of black-and-white faxed photocopies – a prejudicial reduction of quality that hampered Petitioner's defense. Neither the District Court nor the Circuit Court addressed Petitioner's inability to examine the original evidence used to convict him, a seemingly wilful disregard of Petitioner's rights under the Constitution's Confrontation Clause.

Even though the photographs at issue were taken nearly six months prior to trial, the government never offered them to Petitioner despite the

repeated requests of Petitioner's attorney. The photographs were also conspicuously absent from the "open file" maintained by the government. In addition to the circumstantial evidence indicating unprofessional governmental judgment, the prosecuting attorney made the disingenuous claim that he learned about the photographs only when a case agent had sent him a "CD disk with these pictures" the Friday afternoon before trial.[1] Ignoring the government's obvious noncompliance with Rule 16(a), the District Court allowed the photographs to be admitted into evidence.

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[1] Although the prosecutor tried to paint a picture of his valiant attempts to get the photographs to Mr. Valles's counsel, the facts show that the prosecutor delayed informing defendant's counsel in a patent attempt to surprise him with the evidence the morning of the trial. Although the prosecutor purportedly only received the photographs on Friday afternoon, he did not phone the defense counsel then. The prosecutor did not email to the defense counsel copies of the photographs immediately. The prosecutor did not print and fax them on Friday. The Prosecutor instead proceeded to prepare his case, uploading the digital photographs to his computer, inserting them into a PowerPoint presentation, and only then, on Sunday night, printing them out and faxing them to the defense counsel. In terms of *timing*, this was the least effective means of notifying the defense counsel of the photographs, save for placing them in the mail. And in terms of the *quality* of the evidence, a black-and-white fax of a color photograph is little better than a verbal description of the contents of the photograph. Because these photographs were already in digital form when the prosecuting attorney received them, he could have emailed them, which may have possibly resolved the timing and quality issues. That the prosecuting attorney selected a method of notification that was slow, of poor quality, and likely to result in notification being delayed until Tuesday morning is clear evidence of violation of Rule 16.

The government's conduct in this matter was inexcusable and should have resulted in the court's refusal to admit the photographs into evidence. Their subsequent admittance materially harmed Petitioner's defense at the trial level, and the Fifth Circuit's failure to put right this grave error weighs in favour of granting the instant petition. The government's rationale – that the photographs were in the hands of the prosecuting attorney's "case agent" – does not excuse the prosecutor from his responsibility to notify the defendant of their existence.[2]

Both the Fifth Circuit and the Ninth Circuit have made clear that possession of the evidence is determined by whether the *government*, not the *prosecution*, has the evidence. Rule 16 requires disclosure of evidence if, *inter alia*, (1) it is in the custody or control of the government and (2) its existence is known or by the exercise of due diligence could have become known to the attorney for the Government. *United*

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[2] In its appellate brief, the government attempted to jettison any responsibility for complying with Rule 16, showing a callous disregard for the right of the accused to prepare and present an adequate defense, writing that discovery was not required "until the time the prosecutor saw them and decided to use them as exhibits." *Reply Brief for the United States*, at 30. This flippant attitude guts Rule 16 of any real meaning. The exculpatory nature of evidence is not derivative of the prosecutor's subjective intent or of trial strategy. Whether or not a prosecutor intends to use exculpatory evidence in trial, it must be subject to discovery upon the request. To hold otherwise raises serious constitutional issues regarding the Due Process rights of the accused.

States v. Bailleaux, 685 F.2d 1105, 1113 (9th Cir. 1982) ("It does not matter that the U.S. Attorney did not 'receive' the tape until the night before appellant's testimony; it is enough for purposes of the custody requirement of Rule 16 that it was in the possession of the FBI."); *see also United States v. Scruggs*, 583 F.2d 238, 242 (5th Cir. 1978) ("It cannot be disputed that the money orders at issue are Rule 16 evidence and that the government had a duty to produce them for inspection upon proper request by the appellant. Nor is the government excused from its obligation by the fact that the documents were in the possession of the FBI prior to trial."). Similarly, photographic evidence that is in the hands of the prosecution's "case agent" is in the government's possession.

These factors were never considered by the trial judge. Had they been considered, the evidence surely would have been deemed inadmissible. This judicial oversight demands reevaluation, and Petitioner thereby pleads this Court to issue a writ of certiorari.

III. Because the Government Neither Submitted the Facts Underlying Petitioner's Sentence Enhancements to the Jury, Nor Proved Them Beyond a Reasonable Doubt, the Sentence Enhancements Were Impermissibly Applied; A Writ of Certiorari Should Therefore Issue to Ensure Petitioner Receives a Constitutionally Justifiable Prison Sentence.

The right to have the truth of every accusation submitted to an impartial jury picked from the citizenry is a fundamental principle of American jurisprudence. This precept has garnered the unanimous support of this Court. *See United States v. Gaudin*, 515 U.S. 506, 510-11 (1995). Equally important is the companion right to require government prosecutors to prove the truth of each matter asserted beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 477-78 (2000). Any disregard of the right to have every material fact proven to a jury beyond a reasonable doubt results in a trampling of the accused's Fifth Amendment Due Process rights and the jury trial guarantees contained in the Sixth Amendment. *See Jones v. United States*, 526 U.S. 227, 243 (1999); *see also In re Winship*, 397 U.S. 358, 364 (1970) ("The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

In 2000, this Court consolidated the application of the principles outlined above and ruled that

"[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Contravention of this holding results in reversible error.

In Petitioner's case, the District Court and the United States Court of Appeals for the Fifth Circuit incorrectly applied the *Apprendi* standard. This Court should therefore reverse and remand for proper reconsideration of sentencing. The District Court ordered two enhancements to Petitioner's sentence: one for transporting at least six aliens, pursuant to U.S.S.G. § 2L1.1(b)(2)(A), and another for creating an environment of "substantial risk of death or serious bodily injury to another person," pursuant to U.S.S.G. § 2L1.1(b)(6). The application of these two enhancements increased Petitioner's sentencing range from 10-16 months (Offense Level 12) to 27-33 months (Offense Level 18). The enhancements, however, lacked any justification in law or in fact.

First, and most importantly, there is no evidence in the record reflecting the presentment of evidence sufficient to support the enhancements to the jury, and much less any evidence that the reasons justifying the enhancements were, or could have been, proven beyond a reasonable doubt.

With regards to the first enhancement, no evidence was offered tying Petitioner directly to the

transportation of six unlawful aliens. Not only was the numerical requirement unsatisfied, but the government completely disregarded its burden to show, as explicitly required by the sentencing guidelines, that the persons transported were, in fact, unlawful aliens. The only evidence offered with respect to the alienage of the people transported was a hearsay statement communicated from the alleged alien to a federal agent. As hearsay, it was improperly introduced in violation of the Confrontation Clause and Federal Rule of Evidence 802. The Confrontation Clause, which requires that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." U.S. Const. amend. VI, applies "to 'witnesses' against the accused – in other words, those who 'bear testimony.'" *Crawford v. Washington*, 541 U.S. 36, 51 (2004). "Statements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard." *Id.* at 52. Despite the misgivings surrounding statements taken by officers, recognized by this very Court, the District and Circuit Courts incorrectly applied the law and allowed an uncorroborated hearsay statement to be admitted as evidence.

The hearsay evidence admitted, and objected to, was a statement by the investigating immigration officer, Agent Morones. During direct examination of Agent Morones, the prosecutor asked the witness to tell the jury the contents of a conversation he had with the woman found in the horse trailer. Although Petitioner objected on the grounds that the conversation was

hearsay, his objection was overruled and the entire content of that conversation was admitted into evidence on the grounds that the statements made during that conversation were statements against interest. This admission was in error, as the statement was made by an individual who was not "unavailable," the statement was not against her penal interest, and there was no independent corroboration of the veracity of the statement. The abject lack of admissible evidence regarding alienage should suffice to overturn the first enhancement.

The second enhancement, concerning the dangerous transportation conditions, lacks proper justification on two separate grounds: Not only did the alleged alien and her alleged children not testify at Petitioner's trial about the trailer's conditions, a crippling proposition, but no evidence was offered showing Petitioner had a hand in creating the allegedly dangerous conditions.

The jury saw neither evidence connecting Petitioner to the numerical and alienage requirements justifying the first enhancement, nor evidence that might prove, beyond a reasonable doubt, that Petitioner should shoulder the responsibility for creating dangerous travel conditions, as required by the second enhancement. The government thus failed to carry its burden.

Second, because the enhancements applied by the District Court, which lacked the requisite evidentiary support, increased Petitioner's prison sentence

beyond that reasonably called for under the United States Sentencing Guidelines, *Apprendi* dictates that this Court remand his case for a proper sentencing determination.

The government erroneously claimed that Petitioner's *Apprendi* claim lacked merit because "the sentencing judge may find the facts relevant to the determination of the advisory Guideline's sentencing range." *Reply Brief for the United States*, at 47 (*citing United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005)). Petitioner does not question the district judge's discretionary ability to impose a sentence within the sentencing range. However, Petitioner contends that the unilateral usurpation of the power to find facts, a power that the Constitution vests in juries in cases similar to Petitioner's, and especially facts that effectively increase one's offense level such that one's prison sentence is doubled, tramples his Due Process rights under the Fifth Amendment and his jury trial guarantees under the Sixth Amendment. *See Apprendi*, 530 U.S. at 476 ("At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without 'due process of law' ").

The District Court's actions simultaneously deprived Petitioner of his fundamental rights of freedom and liberty and eroded the protections guarding the presumption of innocence. *See Winship*, 397 U.S. at 363. As this Court's decisions teach, the Constitution's guarantee of jury trials proscribes criminal sentencing schemes "that allow a judge to

impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant." *Cunningham v. California*, 127 S. Ct. 856, 860 (2007); *see also Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002); *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005). "[T]he relevant 'statutory maximum,'" this Court has clarified, "is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." *Blakely*, 542 U.S. at 303-04.

The facts on which the District Court based its decision to apply sentencing enhancements , were neither submitted to the jury nor proven beyond a reasonable doubt. As such, they disregard Petitioner's constitutional rights and the precedent of this very Court. Accordingly, Petitioner respectfully requests this Court grant the instant petition for a writ of certiorari.

CONCLUSION

Petitioner respectfully requests this Court grant the instant petition and issue a writ of certiorari.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-41135
Summary Calendar

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

MANUEL ANTONIO VALLES-ZAMORA

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:05-CR-229-2

(Filed Oct. 31, 2007)

Before WIENER, GARZA, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Defendant-Appellant Manuel Antonio Valles-Zamora appeals his jury conviction and 30-month

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

sentence for conspiracy to transport undocumented aliens for private financial gain in violation of 8 U.S.C. § 1324. First, Valles-Zamora contends that the district court erred in denying his motion to compel discovery, in which he sought leave to photocopy particular documents that were in the government's possession. The district court denied this motion during a pre-trial hearing, the transcript of which is not included in the record on appeal. "It is appellant's responsibility to order parts of the record which he contends contain error." *United States v. Narvaez,* 38 F.3d 162, 167 (5th Cir. 1994). Valles-Zamora's failure to provide the relevant transcript prevents review of this issue. *See id.*

Valles-Zamora next asserts that the district court erred pursuant to *Brady v. Maryland,* 373 U.S. 83 (1963), by denying his motion to order the government to disclose the terms of a plea agreement of co-conspirator, Maria Bazan. "This court reviews allegations of *Brady* violations de novo." *United States v. Infante,* 404 F.3d 376, 386 (5th Cir. 2005). "*Brady* rights are not denied where the information was fully available to the defendant and his reason for not obtaining and presenting such information was his lack of reasonable diligence." *Id.* (internal quotation marks omitted). Bazan's plea agreement was filed in the district court under the same case number as Valles-Zamora's case, and Valles-Zamora does not present any reason why he could not have obtained the plea agreement through reasonable diligence. *See id.* at 387.

Valles-Zamora insists that the district court erred in denying his motion to exclude evidence of his involvement in transporting illegal aliens in January and December 2004. "This court reviews for abuse of discretion a district court's decision to admit or exclude evidence." *United States v. Yi*, 460 F.3d 623, 631 (5th Cir. 2006). FED. R. EVID. 404(b) "prohibits evidence of other acts to prove the defendant's conformity therewith," but does not prohibit the introduction of intrinsic evidence. *Id.* at 631-32. Evidence is intrinsic "when the evidence of the other act and evidence of the crime charged are inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged." *United States v. Powers*, 168 F.3d 741, 749 (5th Cir. 1999) (internal quotation marks omitted). As the January and December 2004 acts occurred during the alleged span of the conspiracy and tended to show Valles-Zamora's participation in the conspiracy, the evidence was intrinsic and not subject to Rule 404(b). *See id.*

Valles-Zamora also contends that the district court erred in denying his motion to exclude evidence of the transportation of illegal aliens by Shawn Lara in November and December 2004. Shawn Lara was not named in Valles-Zamora's indictment. Valles-Zamora argues that this evidence was not relevant under FED. R. EVID. 402. "[W]here a conspiracy is charged, acts that are not alleged in the indictment may be admissible as part of the government's proof." *Powers*, 168 F.3d at 749. Valles-Zamora's indictment

alleged that he conspired with "other persons known and unknown" to transport illegal aliens. The evidence relating to Lara's participation in the November and December 2004 incidents was relevant to proving the existence of a conspiracy and Valles-Zamora's participation therein.

Valles-Zamora further asserts in conclusional fashion that, under FED. R. EVID. 403, the probative value of the evidence regarding Lara's acts was outweighed by its prejudicial effect. By failing to brief this issue adequately, Valles-Zamora has waived the issue. *See United States v. Edwards*, 303 F.3d 606, 647 (5th Cir. 2002).

Valles-Zamora advances that the district court erred in not imposing sanctions when the government failed to disclose photographs timely during discovery. Valles-Zamora's argument presupposes that Fed. R. Crim. P. 16(a) was violated, but he fails to brief why the photographs were subject to disclosure under Rule 16(a) and has thus waived the argument. *See Edwards*, 303 F.3d at 647. Neither has Valles-Zamora made the requisite showing of prejudice. *See United States v. Scruggs*, 583 F.2d 238, 242 (5th Cir. 1978).

Valles-Zamora next contends that the evidence was insufficient to prove the illegal status of the aliens being transported and that Valles-Zamora was aware of their illegal status. To establish the existence of a conspiracy to transport illegal aliens, the government must prove beyond a reasonable doubt that there was an agreement between Valles-Zamora

and at least one other person to violate the law, that an overt act was done in furtherance of the agreement, and that Valles-Zamora had knowledge of the agreement and voluntarily intended to join and participate in it. *See United States v. Avila-Dominguez,* 610 F.2d 1266, 1271 (5th Cir. 1980). Tyler Ross Severn, a co-conspirator, testified that he, Valles-Zamora, and another co-conspirator named Porfirio Ortiz, made plans to transport illegal aliens on January 7, 2005, from Rio Grande City, Texas, to Bryan, Texas, using a livestock trailer. Severn testified that Valles-Zamora helped translate the plans between English and Spanish, helped load a horse into the trailer to conceal the aliens, accompanied Severn on the trip in a separate vehicle to ensure that the transport occurred without any problems, and loaded a mother and her four children into the hay storage area of the trailer. A border patrol agent testified that the family was discovered at a border checkpoint, arrested for lack of proper documentation, and returned to Mexico.

Severn also testified that he, Ortiz, and Lara were involved in an ongoing scheme to transport illegal aliens from Mexico. Evidence was presented linking Valles-Zamora to this scheme: Valles-Zamora used a vehicle co-registered to Ortiz while transporting an illegal alien in January 2004; Lara was arrested in December 2004 after using a truck and horse trailer registered to Valles-Zamora to transport nine illegal aliens; and Lara requested that Valles-Zamora be called to pick up the horses involved in the

December 2004 incident. Based on the foregoing evidence, a rational jury could have found beyond a reasonable doubt that Valles-Zamora conspired to transport illegal aliens. *United States v. Nolasco-Rosas,* 286 F.3d 762, 765 (5th Cir. 2002); *United States v. Crispin,* 757 F.2d 611, 613-14 (5th Cir. 1985).

Valles-Zamora claims that his due process rights were violated because his judgment reflects that his sentence was determined as if his offense of conviction was transporting an illegal alien rather than conspiracy to transport an illegal alien. This argument is meritless. Any error in his judgment is merely clerical. The correct section of the United States Sentencing Guidelines was applied in sentencing Valles-Zamora. *See United States v. Cabrera,* 288 F.3d 163, 168 (5th Cir. 2002).

Valles-Zamora advances that the district court erred in assessing a three-level enhancement to his offense level pursuant to U.S.S.G. § 2L1.1(b)(2) (Nov. 2004) on the basis that his offense involved 6 to 24 unlawful aliens. The district court's factual finding of the number of illegal aliens involved in Valles-Zamora's offense is reviewed for clear error. *See Cabrera,* 288 F.3d at 168. In addition to the five-member family that was discovered on the day of Valles-Zamora's arrest, evidence was presented that Valles-Zamora participated in transporting one illegal alien in January 2004 and that a truck and trailer registered to Valles-Zamora was used to transport nine illegal aliens in December 2004. There is no clear error in the court's count.

Finally, Valles-Zamora asserts that the district court erroneously enhanced his offense level pursuant to § 2L1.1(b)(5) (Nov. 2004) for intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person. Valles-Zamora argues that the enhancement was not applicable, as the issue was not presented to the jury and proved beyond a reasonable doubt, as required by *Apprendi v. New Jersey,* 530 U.S. 466, 490 (2000). The record evidence supports the increase. Valles-Zamora's argument is unavailing, because the penalty for his offense was not increased beyond the prescribed statutory maximum provided in 8 U.S.C. § 1324.

AFFIRMED.